

# Senate Daily Reader

# Friday, January 22, 1999

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# State of South Dakota

SEVENTY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 1999

555C0048

## SENATE TAXATION COMMITTEE

### ENGROSSED NO. **SB2** - 1/21/99

**This bill has been extensively amended (hoghoused) and may no longer be consistent with the original intention of the sponsors.**

Introduced by: Senators Brosz, Dennert, Madden, and Olson and Representatives Diedrich (Larry), Broderick, Chicoine, Pummel, and Smidt at the request of the Interim Taxation Committee

1 FOR AN ACT ENTITLED, An Act to provide for the recovery of certain expenses in an action  
2 brought by an appellant relative to the assessment, allocation, or distribution of centrally  
3 assessed property.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

5 Section 1. The sixth judicial circuit court may award disbursements, including attorneys' fees,  
6 in an action brought to court pursuant to chapter 10-38 against any appellant relative to the  
7 assessment, allocation, equalization, or distribution of property if the appellant does not prevail  
8 in its appeal of the property assessment, allocation, equalization, or distribution.

9 Section 2. On motion, the Supreme Court may award reasonable attorneys' fees in an action  
10 brought to the Supreme Court pursuant to chapter 10-38 against any appellant relative to the  
11 assessment, allocation, equalization, or distribution of property if the appellant does not prevail  
12 in its appeal of the property assessment, allocation, equalization, or distribution. The motion shall  
13 be accompanied by counsel's verified itemized statement of costs incurred and legal services  
14 rendered. No award for attorney's fees may be made for or against the State of South Dakota  
15 in the Supreme Court.

1    **BILL HISTORY**

2    1/12/99 First read in Senate and referred to Taxation. S.J. 15

3    1/15/99 Scheduled for Committee hearing on this date.

4    1/15/99 Taxation Do Pass Amended, Failed, AYES 4, NAYS 2.

5    1/15/99 Taxation Deferred to another day.

6    1/20/99 Taxation Do Pass Amended, Passed, AYES 9, NAYS 0. S.J. 126

7    1/20/99 Scheduled for Committee hearing on this date.

# State of South Dakota

SEVENTY-FOURTH SESSION  
LEGISLATIVE ASSEMBLY, 1999

400C0355

## SENATE JUDICIARY COMMITTEE ENGROSSED NO. **SB28** - 1/21/99

Introduced by: The Committee on Judiciary at the request of the Attorney General

1 FOR AN ACT ENTITLED, An Act to establish escrow funds to pay claims brought against  
2 tobacco product manufacturers.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

4 Section 1. The Legislature finds the following:

5 (1) Cigarette smoking presents serious public health concerns to the State of South  
6 Dakota and to the citizens of the state. The surgeon general of the United States has  
7 determined that smoking causes lung cancer, heart disease, and other serious diseases,  
8 and that there are hundreds of thousands of tobacco-related deaths in the United  
9 States each year. These diseases most often do not appear until many years after the  
10 person in question begins smoking;

11 (2) Cigarette smoking also presents serious financial concerns for the state. Under certain  
12 health care programs, the state may have a legal obligation to provide medical  
13 assistance to eligible persons for health conditions associated with cigarette smoking,  
14 and those persons may have a legal entitlement to receive such medical assistance;

15 (3) Under these programs, the state pays millions of dollars each year to provide medical  
16 assistance for these persons for health conditions associated with cigarette smoking;

1 and

- 2 (4) On November 23, 1998, major United States tobacco product manufacturers entered  
3 into a settlement agreement, entitled, Master Settlement Agreement, with the state.  
4 The Master Settlement Agreement obligates these manufacturers, in return for a  
5 release of past, present, and certain future claims against them as described therein,  
6 to pay substantial sums to the state, tied in part to their volume of sales; to fund a  
7 national foundation devoted to the interests of public health; and to make substantial  
8 changes in their advertising and marketing practices and corporate culture, with the  
9 intention of reducing underage smoking.

10 Section 2. In enacting this Act, it is the intention of the Legislature that:

- 11 (1) It is the policy of the state that financial burdens imposed on the state by cigarette  
12 smoking be borne by tobacco product manufacturers rather than by the State of South  
13 Dakota to the extent that such manufacturers either determine to enter into a  
14 settlement with the state or are found culpable by the courts; and
- 15 (2) It would be contrary to this policy of the State of South Dakota if tobacco product  
16 manufacturers who determine not to enter into such a settlement could use a resulting  
17 cost advantage to derive large, short-term profits in the years before liability may arise  
18 without ensuring that the state will have an eventual source of recovery from them if  
19 they are proven to have acted culpably. It is thus in the interest of the state to require  
20 that such manufacturers establish a reserve fund to guarantee a source of  
21 compensation and to prevent such manufacturers from deriving large, short-term  
22 profits and then becoming judgment-proof before liability may arise.

23 Section 3. Terms used in this Act mean:

- 24 (1) "Adjusted for inflation," increased in accordance with the formula for inflation  
25 adjustment set forth in the Master Settlement Agreement;

(2) "Affiliate," a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms, owns, is owned, and ownership, mean ownership of an equity interest, or the equivalent thereof, of ten percent or more, and the term, person, means an individual, partnership, committee, association, corporation, or any other organization or group of persons;

(3) "Allocable share," allocable share as that term is defined in the Master Settlement Agreement;

(4) "Master Settlement Agreement," the settlement agreement, and related documents, entered into on November 23, 1998, by the State of South Dakota and major United States tobacco product manufacturers which is filed as part of the court record in *State of South Dakota, et al. v. Philip Morris, Inc., et al.*, Civ. No. 98-65, Sixth Judicial Circuit, Hughes County;

(5) "Qualified escrow fund," an escrow arrangement with a federally or state-chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least one billion dollars where such arrangement requires that the financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with section 8 of this Act;

(6) "Released claims," released claims as that term is defined in the Master Settlement Agreement;

(7) "Releasing parties," releasing parties as that term is defined in the Master Settlement Agreement.

Section 4. For the purposes of this Act, the term, cigarette, means any product that contains

1 nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or  
2 contains:

3 (1) Any roll of tobacco wrapped in paper or in any substance not containing tobacco;

4 (2) Tobacco, in any form, that is functional in the product, which, because of its  
5 appearance, the type of tobacco used in the filler, or its packaging and labeling, is  
6 likely to be offered to, or purchased by, consumers as a cigarette;

7 (3) Any roll of tobacco wrapped in any substance containing tobacco which, because of  
8 its appearance, the type of tobacco used in the filler, or its packaging and labeling, is  
9 likely to be offered to, or purchased by, consumers as a cigarette described in  
10 subdivision (1) of this definition.

11 The term, cigarette, includes, roll-your-own, meaning any tobacco which, because of its  
12 appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or  
13 purchased by, consumers as tobacco for making cigarettes. For purposes of this definition,  
14 0.09 ounces of roll-your-own tobacco constitutes one individual cigarette.

15 Section 5. For the purposes of this Act, the term, tobacco product manufacturer, means an  
16 entity that, on or after July 1, 1999, directly, and not exclusively through any affiliate:

17 (1) Manufactures cigarettes anywhere which the manufacturer intends to be sold in the  
18 United States, including cigarettes intended to be sold in the United States through  
19 an importer, except where such importer is an original participating manufacturer, as  
20 that term is defined in the Master Settlement Agreement, that will be responsible for  
21 the payments under the Master Settlement Agreement with respect to such cigarettes  
22 as a result of the provisions of subsections II(mm) of the Master Settlement  
23 Agreement and that pays the taxes specified in subsection II(z) of the Master  
24 Settlement Agreement, and provided that the manufacturer of such cigarettes does not  
25 market or advertise such cigarettes in the United States;

1       (2)   Is the first purchaser anywhere for resale in the United States of cigarettes  
2            manufactured anywhere that the manufacturer does not intend to be sold in the United  
3            States; or

4       (3)   Becomes a successor of an entity described in subdivision (1) or (2).

5       The term does not include an affiliate of a tobacco product manufacturer unless such affiliate  
6       itself falls within subdivision (1), (2), or (3).

7       Section 6. For the purposes of this Act, the term, units sold, means the number of individual  
8       cigarettes sold in the state by the applicable tobacco product manufacturer, whether directly or  
9       through a distributor, retailer, or similar intermediary or intermediaries, during the year in  
10      question, as measured by excise taxes collected by the state on packs bearing the excise tax  
11      stamp or imprint of the state, or on roll-your-own tobacco. The secretary of revenue shall  
12      promulgate, pursuant to chapter 1-26, such rules as are necessary to obtain information from any  
13      licensee, licensed under the authority of the Department of Revenue, to ascertain the amount of  
14      state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. The  
15      Department of Revenue may provide information obtained pursuant to this section as is  
16      necessary for a tobacco product manufacturer to compute its escrow payment under section 7  
17      of this Act.

18      Section 7. Any tobacco product manufacturer selling cigarettes to consumers within the  
19      state, on or after July 1, 1999, whether directly or through a distributor, retailer, or similar  
20      intermediary or intermediaries, shall do one of the following:

21      (1)   Become a participating manufacturer, as that term is defined in section II(jj) of the  
22            Master Settlement Agreement, and generally perform its financial obligations under  
23            the Master Settlement Agreement; or

24      (2)   Place into a qualified escrow fund by April fifteenth of the year following the year in  
25            question the following amounts, as such amounts are adjusted for inflation:



- (a) For 1999: \$.0094241 per unit sold after the date of enactment of this Act;
- (b) For 2000: \$.0104712 per unit sold;
- (c) For each of 2001 and 2002: \$.0136125 per unit sold;
- (d) For each of 2003 through 2006: \$.0167539 per unit sold;
- (e) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

Section 8. A tobacco product manufacturer that places funds into escrow pursuant to subdivision (2) of section 7 of this Act shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

- (1) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this subdivision in the order in which they were placed into escrow and only to the extent and at the time necessary to make payments required under such judgment or settlement;
- (2) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow in a particular year was greater than the state's allocable share of the total payments that such manufacturer would have been required to make in that year under the Master Settlement Agreement, as determined pursuant to section IX(i)(2) of the Master Settlement Agreement, and before any of the adjustments or offsets described in section IX(i)(3) of the Master Settlement Agreement other than the inflation adjustment, had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or
- (3) To the extent not released from escrow under subdivision (1) or (2) of this section, funds shall be released from escrow and revert back to such tobacco product

1 manufacturer twenty-five years after the date on which they were placed into escrow.

2 Section 9. Each tobacco product manufacturer that elects to place funds into escrow shall  
3 annually certify its compliance with section 7 of this Act to the attorney general. The attorney  
4 general may bring a civil action on behalf of the State of South Dakota against any tobacco  
5 product manufacturer that fails to place into escrow the funds required. Any tobacco product  
6 manufacturer that fails in any year to place into escrow the funds required by section 7 of this  
7 Act shall:

8 (1) Within fifteen days place such funds into escrow as shall bring it into compliance with  
9 section 7 of this Act. The court, upon a finding of a violation of section 7 of this Act,  
10 may impose a civil penalty to be paid to the state general fund in an amount not to  
11 exceed five percent of the amount improperly withheld from escrow per day of the  
12 violation and in a total amount not to exceed one hundred percent of the original  
13 amount improperly withheld from escrow;

14 (2) In the case of a knowing violation, within fifteen days place such funds into escrow  
15 as shall bring it into compliance with section 7 of this Act. The court, upon a finding  
16 of a knowing violation of section 7 of this Act, may impose a civil penalty to be paid  
17 to the state general fund in an amount not to exceed fifteen percent of the amount  
18 improperly withheld from escrow per day of the violation and in a total amount not  
19 to exceed three hundred percent of the original amount improperly withheld from  
20 escrow; and

21 (3) In the case of a second knowing violation, be prohibited from selling cigarettes to  
22 consumers within the state, whether directly or through a distributor, retailer, or  
23 similar intermediary, for a period not to exceed two years.

24 Section 10. Each failure to make an annual deposit required under section 7 of this Act  
25 constitutes a separate violation.

1    **BILL HISTORY**

2    1/12/99 First read in Senate and referred to Judiciary. S.J. 20

3    1/20/99 Scheduled for Committee hearing on this date.

4    1/20/99 Judiciary Do Pass Amended, Passed, AYES 7, NAYS 0. S.J. 125